No. 96-1184

Supreme Court, U.S.
FILED
APR 11 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE IN OPPOSITION TO BRIEF OF AMICI CURIAE, THE STATES OF NEW HAMPSHIRE, VERMONT, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, MAINE, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, AND WYOMING, AND BRIEF OF AMICI CURIAE, THE LAW TEACHERS

JAMES T. FERRINI*
MICHAEL R. GRIMM
MELISSA A. MURPHY-PETROS
CLAUSEN MILLER P.C.
10 South LaSalle Street
Chicago, Illinois 60603
(312) 855-1010

Attorneys for Respondents
EDELMAN & COMBS
and DANIEL A. EDELMAN

Of Counsel:

RONALD E. STACKLER
STACKLER & STACKLER
200 West Ohio Street
Chicago, Illinois 60610
(312) 337-6663

*Counsel of Record

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

RESPONSE TO THE AMICI CURIAE BRIEFS FILED BY THE ATTORNEYS GENERAL AND THE LAW TEACHERS

The Amici Are No Friends Of This Court

This point must be made up-front. The several Attorneys General are not true *amici curiae*. An *amicus* is a "friend of the court" who is neither a party to the litigation nor a representative of a party. *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) An *amicus* is impartial and not an advocate for one party rather than another. *Leigh v. Engle*, 535 F. Supp. 418, 419-20 (N.D. Ill. 1982) The several Attorneys General have been tainted by their inclusion of the Florida Attorney General within their number. The Florida Attorney General *has represented parties to this litigation*. The Florida Attorney General appeared in *Hoffman* on behalf of members of the petitioners' class and indeed made the very arguments he now makes as this Court's "friend."

This undisclosed fact disqualifies the Attorneys General as *amici*. *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D. N.J. 1993) One who is "patently partisan . . . should not be allowed to appear as *amicus curiae*." *Id.* at 82.

The fact that the *amici* are advocates rather than advisers to this Court is further illustrated by their briefs. The *amici* have failed to present any original arguments. They merely repeat the assertions advanced in the Petition for Writ of Certiorari. Respondents have addressed those assertions in their Brief in Opposition and will not burden this Court with repetition.

Nevertheless a response is required. The *amici* have misdescribed this case. This is not the case described in

the media sound bites petitioners fed the press. (Attys. Gen. Brf. p.4, n.5) This is not the case the law teachers describe in their published law notes (Attys. Gen. Brf. pp.1-3, n2) The *amici* have distorted this case to force-fit it into their pre-conceived agenda.

Rooker-Feldman Applies—The *Amici* Speak From Both Sides Of Their Mouth

The Attorneys General assert that class counsel, "through malfeasance," failed to represent petitioners' interest (Attys. Gen. Brf. p.15) and then, inconsistently assert that petitioners' lawsuit is "factually independent of the *Hoffman* judgment." The *amici* cannot have it both ways. The federal district court cannot try petitioners' claim of malpractice without litigating the predicate of the claim, i.e. whether the fees were reasonable,—and that was decided by the *Hoffman* court. The issues are intertwined and thus Rooker-Feldman controls. The district court cannot decide that respondents "defrauded the *Hoffman* court" without reconsidering the evidence and determining the value of the class settlement. Stated in the words of District Judge Plunkett, petitioners would have the federal court "undo what the Alabama court did." (Pet. App. 31)

No Challenge To Jurisdiction Or The Adequacy Of Representation

This is not the case described by the *amici* wherein plaintiff obtained a state court judgment without jurisdiction. The issue of jurisdiction was adjudicated by the *Hoffman* court and the Seventh Circuit correctly recog-

nized that it is bound by that co-equal court's adjudication.

The *amici* have also misdescribed this case by asserting that due process was not fairly adjudicated because defendants "controlled the information brought before the court" and that as a consequence the *Hoffman* court could not determine "whether the notice contained false statements of material fact." (Attys. Gen. Brf. p.15, n.12) Respondents did not "control" the information brought before the court. The court appointed Special Master and the Florida Attorney General were not denied access to any evidence. Also, the Florida Attorney General actively conducted an examination of the witnesses and filed a brief wherein he made *the very arguments* he now makes as this Court's alleged *amicus*.

Indeed, the record demonstrates that due process assertions now made to this Court are a contrived afterthought. Review of petitioners' complaint (Pet. App. A49-A105) discloses that petitioners did not challenge the *Hoffman* court's jurisdiction or the adequacy of their representation and petitioners did not ask the court to set the *Hoffman* court's rulings aside. To the contrary, petitioners have consistently asserted that they *do not* seek to set aside the class settlement or any decision by the *Hoffman* court. (Pet. Opening Brf. before 7th Cir. at p.4)

Additionally, there is not even a colorable basis for an allegation of a due process violation. The class notice which is before this Court (Resp. App. 1-3) makes plain on its face that that notice made no assurances but instead stated, in neutral terms, the questions to be decided and in particular the fact that fees, if allowed, would be paid out of the members' escrow accounts.

The Calculation Of Fees

The following statement by the Attorneys General is incorrect:

> Rather than basing the amount of attorney's fees on the actual economic benefit to the class members (that is, on the value of having earlier access to any excess escrow funds) the settlement provided for fees calculated as a percentage *of the total of excess escrow* funds themselves—money which had always belonged to the class. (Attys. Gen. Brf. p.5)

The *Hoffman* court stated that the economic benefit of the settlement is at least as valuable to the class as the immediate refund to the class—but this is a statement of value—not a determination that the fees should be based upon the excess funds. The court based its determination of fees upon the time value of those funds. Moreover, that value, according to the Florida Attorney General, was approximately $32 million. (Doc.39, Exh.B at 2, 3, 13, 14, 18) Thus the fees awarded were far less than one-third of the economic benefit of the settlement.

CONCLUDING REMARKS— CLASS SETTLEMENTS AT PERIL

This is not a case where absent class members were not afforded safeguards. This is a case of extraordinary safeguards—far more than are afforded in the overwhelming majority of settlement hearings. The court appointed a Special Master to advise the court of the fairness of the proposed settlement and fees. Also, *the very arguments* now presented by petitioners were made by those members of the petitioners' class who intervened in *Hoffman* and actively participated in the evidentiary proceedings.

If such settlement is subject to collateral attack, all class settlements are open to collateral attack. Federal courts may review state court judgments; state courts may review federal court judgments. If petitioners succeed they will have destroyed class actions as a vehicle for the protection of consumer rights. No judicially approved class settlement could be deemed final.

The *amici* simply cannot excuse the class members from the consequences of their deliberate decisions: the fact that some members elected to ignore the notice and neither opted out nor objected; the fact that some class members intervened but elected not to appeal the state court's decision. The class members cannot be permitted to retain the benefits of the settlement—which they do not seek to set aside—and collaterally attack the state court's fact intensive determination of the value of the economic benefit.

For these reasons and for the reasons stated and authorities cited in their Brief in Opposition, Respondents respectfully ask this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES T. FERRINI*
MICHAEL R. GRIMM
MELISSA A. MURPHY-PETROS
CLAUSEN MILLER P.C.
10 South LaSalle Street
Chicago, Illinois 60603
(312) 855-1010

Attorneys for Respondents
EDELMAN & COMBS
and DANIEL A. EDELMAN

Of Counsel:
RONALD E. STACKLER
STACKLER & STACKLER
200 West Ohio Street
Chicago, Illinois 60610
(312) 337-6663

*Counsel of Record